INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

September 7, 2012

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Communication: MB Docket Nos. 12-68, 07-18, 15-192

Dear Ms. Dortch:

On September 6, 2012, Genevieve Morelli of the Independent Telephone & Telecommunications Alliance ("ITTA"), Jeb Benedict of CenturyLink, and the undersigned met with Matthew Berry, Commissioner Pai's Chief of Staff, Erin McGrath, legal advisor to Commissioner McDowell, and Holly Saurer, acting legal advisor to Commissioner Rosenworcel, to provide an overview of ITTA's position with respect to extension of the contract exclusivity prohibition of the Commission's program access rules.[1] The attached presentation, provided during the meeting, summarizes what ITTA discussed.

ITTA emphasized its belief that the Commission should extend the contract exclusivity prohibition for an additional five years.[2] Although there have been positive developments in the retail multichannel video distribution ("MVPD") marketplace since the ban was last extended in 2007 (*e.g.*, increased competition), the wholesale market with respect to content access remains virtually unchanged in terms of vertically-integrated MVPDs' ability and incentive to withhold programming from competing MVPDs.[3] In fact, consistent with the Commission's previous findings, this growth in retail competition has only increased vertically-integrated MVPDs' incentive to withhold programming that is necessary for ITTA members and other MVPDs to compete effectively.[4]

All ITTA member companies offer a video product to subscribers. As new entrants to the video distribution marketplace, ITTA members face unique challenges. The provision of video service is essential for ITTA members to compete against incumbent providers, yet their unequal bargaining power in comparison to vertically-integrated programmers and video providers in the

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[1] *See* 47 U.S.C. § 548.

[2] *See* Comments of the Independent Telephone & Telecommunications Alliance, MB Docket No. 12-68 (filed June 22, 2012) ("ITTA Comments").

[3] *Id.* at 3-8.

[4] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 22 FCC Rcd 17791, ¶ 60-61 (2007), *aff'd sub nom. Cablevision Sys. Corp., et al. v. FCC* 597 F.3d 1306 (D.C. Cir. 2010.

markets they serve means they are subject to higher rates and unfair terms for the carriage of critical programming.

Despite the D.C. Circuit's dicta that marketplace changes may at some point warrant lifting the ban,[5] the contract exclusivity prohibition continues to be necessary to preserve and protect competition in the MVPD marketplace.[6] Furthermore, while vertically-integrated MVPDs' incentive is high with respect to RSN programming, the program access exclusivity prohibition continues to be necessary with respect to all vertically-integrated programming. The ability to offer a comprehensive line-up of diversified programming options that appeal to a wide audience and a variety of interests is critical for competing MVPDs, particularly new entrants, to constitute a viable competitive alternative to dominant incumbent cable operators.

The Commission must extend the ban for an additional five years to ensure it is meeting its statutory mandate, as reliance on existing provisions, such as the Commission's program access complaint process, would be wholly ineffective. The complaint process, which is inadequate even for large, well-financed MVPDs, is unusable for smaller and new entrant MVPDs who cannot devote the substantial time and resources required to pursue such relief.[7] The Commission also must act quickly to address discriminatory pricing practices with respect to cable-affiliated programming to ensure that smaller and new entrant MVPDs can compete effectively against incumbent and vertically-integrated MVPDs and provide programming that subscribers desire.[8]

Please do not hesitate to contact me with any questions regarding this submission.

Respectfully submitted,

Mel Caldwell

Micah M. Caldwell
Vice President, Regulatory Affairs

Attachment

cc: Matthew Berry
Erin McGrath
Holly Saurer

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[5] *Cablevision Sys. Corp., et al. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010).

[6] It also is important for the Commission to keep in mind that the provision of video service by ITTA member companies offers a huge benefit to subscribers and facilitates broadband deployment and adoption because ITTA members that offer video as part of their service offerings have higher broadband take rates among their customers. *See* ITTA Comments at 8-9. The FCC's policies on and program access must promote ITTA members' reasonable and non-discriminatory access to video content in order to further competition and broadband deployment and adoption goals.

[7] *Id*. at 9-10.

[8] *Id*. at 10-12.

ITTA Program Access Meeting
September 6, 2012
MB Docket Nos. 12-68, 07-18, 05-192

About ITTA.

- ITTA represents mid-size communications companies that provide voice, broadband, Internet, and video services to more than 20 million access lines in 44 states. ITTA's membership includes CenturyLink, Cincinnati Bell, Comporium Communications, Consolidated Communications, FairPoint Communications, Hargray Communications, HickoryTech Communications, and TDS Telecom.
- As new entrants to the video distribution marketplace, ITTA members require reasonable and non-discriminatory access to video content in order to compete effectively. The Commission's program access protections, particularly the contract exclusivity prohibition, are crucial to promoting and preserving such competition.

The FCC Should Extend the Cable Exclusivity Prohibition for an Additional 5 Years.

- ***The Characteristics of Vertically-Integrated MVPDs Remain Largely Unchanged Since the Last Extension in 2007.***
  - Vertically-integrated cable operators continue to be the dominant providers in the video distribution market.
    - Cable currently has 60% market share.
    - Wireline providers only have 8% market share.
  - The number of vertically-integrated national programming networks remains virtually unchanged at 115 (in 2007 there were 116).
    - The number of vertically-integrated networks within the top 25 programming networks by subscribership increased from 6 in 2007 (24%), to 7 today (29%).
    - The number of vertically-integrated networks within the top 25 programming networks by prime time rating has remained at 7 since 2002 (29%).
  - The number of vertically-integrated cable operators has increased to 6 today (in 2007 there were 5).
  - The number of vertically-integrated Regional Sports Networks (RSNs) has increased from 18 in 2007, to 57 today.

- ***Vertically-Integrated Cable Programmers Retain Incentive and Ability to Harm Competition.***
  - Some vertically-integrated programming, particularly RSNs, is non-replicable in nature.
  - When the FCC last extended the cable exclusivity prohibition in 2007, it concluded that the emergence of new MVPD competitors actually *increased* the incentive of vertically-integrated cable companies to withhold programming.
  - Even with the presence of the program access rules, there have been a series of high-profile disputes impacting millions of consumers (*e.g.*, AT&T/Verizon v. MSG/Cablevision).
  - The Commission has concluded that vertically-integrated programmers continue to have the incentive and ability to harm competition on several occasions since 2007 (*e.g.*, closing of the terrestrial loophole, Comcast/NBCU, AT&T/Verizon v. MSG/Cablevision).

The Contract Exclusivity Prohibition Continues to be Necessary to Preserve and Protect Competition.

- ***The D.C. Circuit's Decision Regarding the 2007 Extension Order Was Misguided.***
  - The Court stated its expectation "that if the market continues to evolve at such a rapid pace, the Commission will soon be able to conclude that the [exclusive contract] prohibition is no longer necessary."
  - However, despite positive developments with respect to video distribution in recent years, the current marketplace structure continues to allow discrimination by vertically-integrated MVPDs.
- Once the Commission lifts the ban, there is no turning back.
- A transaction-by-transaction approach with respect to application of program access protections is inadequate to ensure the Commission can continue to meet its statutory mandate.
  - Addressing program access concerns in the context of specific transactions is bad policy.
  - There is merit to rules that apply industry-wide for reasons of regulatory parity and certainty.
  - There may be transactions that raise the anti-competitive concerns designed to be addressed by the program access rules that do not fall within the Commission's purview (*e.g.*, Time Warner Cable buys Viacom).

The Program Access Protections Promote the Commission's Broadband Deployment Goals.

- ***The Provision of Video Service Drives Broadband Deployment***
  - Research shows that telcos that offer Internet along with a video component have broadband take rates nearly 24% higher than companies offering Internet without access to video service.
  - Program access protections that allow non-discriminatory access to programming enable telco providers to control costs, thus facilitating their continued investment in broadband facilities and their provision of advanced services desired by consumers (*e.g.*, a "triple play" of voice, video, and data services).

Implementing a Partial Sunset Would Be Problematic and Ineffectual.

- ***Market-by-Market Solution Will not Work***
  - A market-by-market solution would be administratively difficult to implement. Even vertically-integrated cable operators agree on this.
  - The negative competitive impact of such an approach would be particularly acute in smaller markets due to the competitive imbalance between smaller and new entrant MVPDs and their larger, often vertically-integrated, competitors.
  - Smaller MVPDs cannot afford to engage in protracted litigation on program access disputes or market-by-market determinations.

- ***Program-Specific Prohibitions Will not Work***
  - It would be difficult – if not impossible – to develop an objective process of general applicability to determine what programming, in which markets, may or may not be essential to preserve and protect competition.

- In a world of bundled programming, the Commission would have to consider how to evaluate exclusive arrangements that apply to a suite of programming rather than to an individual network. This could make an already challenging line-drawing exercise more difficult.

- ***Reliance Upon Remaining Program Access Provisions Would be Ineffective***
  - Even under the remaining program access provisions, competitive MVPDs would be required to devote enormous amounts of time and money to prove harm.
  - Smaller MVPDs would be at a particular disadvantage, due to their very limited resources as compared to those of their vertically-integrated opponents.
  - By the time the Commission acts on complaint, the harm in the form of subscriber losses, decreased market share, and the ability to compete, is already done.

The Commission Should Utilize This Proceeding to Address Discriminatory Pricing Practices.

- ***Volume discounts place smaller and new entrant MVPDs at an unreasonable competitive disadvantage vis-à-vis larger and vertically-integrated providers.***
  - Per subscriber fees for national network programming are approximately 30% higher for smaller and new entrant MVPDs.
  - Per subscriber fees for RSNs are as much as 50% higher for smaller and new entrant MVPDs.
  - These differences bear no relationship to legitimate differences in the costs of producing or distributing video services.
  - The Commission's complaint process, which contemplates challenges to volume-based pricing, does not provide meaningful relief.

- ***Uniform price increases also place smaller and new entrant MVPDs at a competitive disadvantage.***
  - When vertically-integrated programming distributors charge all distributors, including themselves, a higher rate for affiliated programming that they can treat as an internal transfer in setting their own prices, it forces competing MVPDs to (i) pay more for vertically-integrated programming, (ii) increase retail rates for subscribers, or (iii) forgo purchasing the programming altogether.
  - While a uniform price increase may appear facially neutral in that it applies to all MVPDs equally, this practice has a disparate impact on non-vertically-integrated MVPDs and therefore constitutes discrimination that is actionable under Section 628.
  - Alternatively, uniform price increases qualify as an "unfair act" that significantly hinders or prevents a competing MVPD from providing programming to consumers.